

69-1700-8425-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by
David Beaulieu, Commissioner
Department of Human Rights,
Complainant,

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

v.

RSJ, Inc., d/b/a Jose's
American Bar & Grill, and
Joseph Schaefer,
Respondents.

The above-entitled matter came on for hearing on June 27, 1994, at the Office of Administrative Hearings, 100 Washington Square, Minneapolis, Minnesota, before Administrative Law Judge Steve M. Mihalchick. The hearing continued on June 28 and 29, 1994. At the close of the hearing, the record remained open for filing posthearing briefs. On September 23, 1994, the record closed in this matter.

Michael C. Black, Attorney at Law, 265 West Seventh Street, Suite 201, St. Paul, Minnesota 55102 appeared on behalf of RSJ, Inc., and Joseph Schaefer the Respondents in this matter. Erica Jacobson, Assistant Attorney General Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130 appeared on behalf of the Department of Human Rights (hereinafter "the Department" or "DHR").

Based on the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. RSJ, Inc. is a Minnesota corporation that operated a restaurant in Butler's Square, Minneapolis, Minnesota. The only shareholders of RSJ, Inc. are Joseph and Linda Shaefer and Mark Rutsick. The Shaefer's own 70 percent the shares and Rutsick owns the remaining 30 percent. Decisions regarding the operation of RSJ, Inc. were made primarily by Joseph Shaefer. After the event

in this matter, RSJ, Inc., sold its assets and is now defunct. Shaefer is in bankruptcy.

2. In addition to RSJ, Inc., Shaefer had effective control of two other corporations, each operating one restaurant. The restaurants are located in St. Paul and Mendota Heights. Originally, all these restaurants had different names and formats. In 1991, Shaefer opened a restaurant in Burnsville with Jose's name and format.

3. By February, 1989, the St. Paul, Mendota Heights, and Minneapolis stores had adopted the same name and format. The name was Jose's American Grill and the format was described as "an American-type menu with some Mexican flare." Tr. at 330-31. Each restaurant contained televisions tuned to stations carrying sporting events, a casual menu, and a fully-stocked bar. The waitstaff was exclusively female and wore a uniform of a white oxford shirt (with Jose's logo) and a denim skirt. The length of the denim skirt was supposed to be above the knee, but the length requirement was not enforced. An attempt had been made in the summer of 1988 to enforce a skirt length of two to three inches above the knee. The attempt was abandoned after a number of waitresses, including Mary Pucel, objected to the skirt length as shorter than she would like to wear on the job. The male staff of cooks and bartenders wore shirts and long pants. Managerial staff, male or female, wore shirts and long pants.

4. In February, 1989, Shaefer took a trip to Atlanta, Georgia. Shaefer had heard of a restaurant/bar concept which he thought sounded suitable for Minneapolis Jose's. Bill Motzko, General Manager of the Minneapolis Jose's; Ann Boyne, Manager of all three Shaefer restaurants; and Chuck Seifert, General Manager of the St. Paul Jose's, accompanied Shaefer on this trip. They visited several Hooters restaurants. The waitstaff at Hooters was exclusively female, dressed in tank tops and bright orange running shorts. The tops were altered by tying them at the bottom, either in front or in back. The only male staff visible at Hooters wore shirts and long pants. Pictures of staff with celebrities or at sporting events were framed on the walls. Most of the staff in the pictures were women. The women in most of the pictures were wearing orange running shorts. The waitstaff were encouraged to make conversation with the customers. Shaefer considered the attitude of the waitstaff to be genuine and unscripted. He noted that Hooters produced a calendar with pictures of women wearing the Hooters uniform and with language laden with sexual innuendo.

5. Upon returning to Minneapolis, Shaefer and the other managerial staff discussed the Hooters concept. Shaefer decided to try that concept at the Minneapolis Jose's. That restaurant had the lowest revenue of the three Jose's. Shaefer also concluded that he could only afford to purchase the new uniforms for staff at one restaurant at that time. Shaefer wanted his managerial staff available to assist in the uniform transition at the Minneapolis Jose's. Some opposition to the uniform change was expected by Shaefer and the managerial staff due to the disputes the previous summer over skirt length.

6. Orange running shorts were purchased for the female waitstaff at the Minneapolis Jose's from the distributor that supplies Hooters. The shorts were the same type supplied to Hooters. The only sizes purchased were medium,

small, and extra small. The tank tops were obtained in Minneapolis from a local supplier. No advance notice of a uniform change was given to the employees prior to the first day the tank tops were to be worn.

7. Mary Pucel heard rumors of a uniform change at the Minneapolis Jose's that would require the waitresses to wear biking shorts and small tops. Pucel opposed any such change and discussed her objections with Sandy Cordova, Manager of the Minneapolis Jose's; Bill Motzko; and Michele Hanson, Assistant

Manager of the Minneapolis Jose's. Some of the items discussed included whether the uniform change was legal and how Pucel would be embarrassed by a change.

8. Prior to the uniform change rumors, Motzko had talked to Pucel about taking a position as head waitress. The duties of the position were not specified, but Pucel considered that to be a promotion. Pucel received the employee of the month award for April, 1989. Mary Pucel was told on Friday April 28, 1989, by Bill Motzko that she was terminated from employment with Minneapolis Jose's. Pucel made repeated requests for a reason for the termination, but no reason was given. She had been fired because it was known that she would not wear the new uniform.

9. On Friday, April 28, 1989, female waitstaff reporting to work at the Minneapolis Jose's were given the tank tops and advised that this was required as part of the uniform. Kathleen Lucken Saari, Kelly Lowrie, Elizabeth Sheahan, and Christine Bergman went to the women's restroom to change into the garment. All of the women became upset because the tank top fit so loosely that any bending movement caused the top to fall away from their bodies. Anyone looking would be able to see their bodies down to their waists. Their bras would be clearly visible to patrons in the normal course of serving food or drinks.

10. Kelly Lowrie telephoned her roommate to bring a lycra top to wear under the tank top, to provide some measure of comfort in wearing the tank top. For the single hour, from 8:00 p.m. to 9:00 p.m. on Friday night, Lowrie wore the tank top without the additional top underneath. She received a comment from a male patron that he could see Lowrie's bra, and he made a joke about that fact to a male companion in Lowrie's presence. After Lowrie put on the lycra top, Sandy Cordova advised Lowrie that nothing beyond a bra could be worn under the tank top. Lowrie indicated that she was wearing a type of bra but Cordova told her that the lycra top was not acceptable. Lowrie showed Cordova how the tank top did not provide adequate coverage. She also told Cordova that the tank top embarrassed her and that Lowrie was not comfortable wearing that garment. No alternative was provided to wearing the tank top.

11. Lori Lickteig began employment with RSJ, Inc. as a waitress in November, 1986. In April, 1988, Lickteig was promoted to the position of part-time assistant manager. Lickteig also worked as a waitress at the Minneapolis Jose's. At that time, Lickteig was a student at the University of Minnesota. When she was managing, Lickteig wore an oxford shirt and pants. Lickteig wore the waitress uniform (shirt and jean skirt) when working her waitress shifts.

12. In April, 1989, Lickteig heard rumors about a uniform change from the staff at the Minneapolis Jose's. She spoke to Ann Boyne about the rumors and passed on the objections that the staff had to such a change. On April 28, 1989, Lickteig was directed to pass out tank tops to the female waitstaff. Lickteig was directed by management to encourage the women to be creative in altering the tops and had scissors available for that purpose. Lickteig witnessed the problems the female waitstaff experienced with the tops detailed in Findings 9 and 10, above.

13. During the evening shift on April 28, 1989, Cordova showed Lickteig the orange running shorts that would complete the uniform. Cordova was upset at the prospect of requiring the female waitstaff to wear this article of clothing, particularly after the opposition to the tank top. Cordova told Lickteig not to tell anyone, as the change to shorts was to remain a secret until after the Saturday evening receipts were collected from the female waitstaff. The shorts would be passed out that night and be part of the uniform beginning Monday, May 1, 1989. Lickteig objected to the length and flimsiness of the shorts. She voiced these objections to Ann Boyne, who informed Lickteig that management staff would not have to wear the uniform, Lickteig would have to wear it while working her waitstaff shifts.

14. Lickteig informed Boyne that Kelly Lowrie could not wear the top, because it kept falling off her shoulders. Lickteig asked Boyne if something could be worn under the tank top. Boyne informed Lickteig that nothing additional could be worn with the uniform. This information increased Lickteig's opposition to the uniform, since her father occasionally brought clients into the Minneapolis Jose's. Lickteig felt embarrassment at the prospect of her father seeing her in the new uniform.

15. Elizbeth Sheahan has worked for Independent School District No. 28 from 1984 to the present, except for one year spent in Chicago, Illinois. Sheahan is as a social worker and administrative assistant for the school district. On March 8, 1989, Sheahan began working as waitstaff for the Minneapolis Jose's on a part-time basis. Sheahan wore the tank top before the full uniform change went into effect. She felt "gross" or "sleazy" when wearing the tank top and she became self-conscious about how she moved in performing her work duties to avoid exposing herself.

16. Kathleen Lucken Saari was a student at the University of Minnesota in 1989. In March, 1989, Saari began work as a bartender in the Minneapolis Jose's. Until April 28, 1989, Saari wore the oxford shirt and jean skirt that the female waitstaff wore. On April 27, 1989, Saari was telephoned by Michelle Hanson and told to be sure to shave her armpits in anticipation of a new uniform top. When she arrived at work on April 28, 1989, Saari was given one of the tank tops. After she tried the garment on, Saari asked Motzko and Cordova if there were any other options to wearing the tank top. Saari expressed her concern that tending bar was like being "on stage" and she would be humiliated by wearing the tank top. Cordova stated there was no other option to wearing the tank top.

17. Saari was one of four bartenders working on the night of April 28, 1989. Saari wore the tank top and jean skirt that night, as did the other female bartender. Two men were bartending that night, wearing T-shirts and

long pants. Saari felt embarrassed and self-conscious. She heard whispering, snickering, and jokes about the way the tank top looked on her. Due to the location of the beer coolers, customers could look down her top whenever Saari pulled out a bottle of beer. The only way Saari could avoid exposing herself was to hold her tank top against her chest with one hand while bringing out beer with the other.

18. Christine Bergman began working as waitstaff at the Minneapolis Jockey Club in 1988. About six months later she began splitting time between waitstaff shifts and bartending. Before her shift on Monday, May 1, 1989,

Bergman and Lowrie sat down with Motzko, Boyne, and Cordova to discuss their objections to the new uniform. The women were informed that they could work only when they wore the new uniform. Of the ten to fifteen women working as waitstaff at the Minneapolis Jose's, only between three to five women remained after the uniform change. Bergman was prevented from working for four days until a properly-sized pair of shorts was obtained.

19. The first shift for Kelly Lowrie after the full uniform change was May 3, 1989. She appeared for that shift at the Minneapolis Jose's wearing her previous uniform. Lowrie was prepared to begin work. Motzko asked if Lowrie would wear the new uniform and she responded negatively. After a discussion of ten minutes, Motzko told Lowrie she was not fired, but she would not be allowed to work without the new uniform. Lowrie refused to wear the new uniform and was not allowed to work her shift.

20. Kathleen Lucken Saari did not have any shifts after the tank top was introduced until May 3, 1989. When she arrived for work on May 3, Motzko showed her the new uniform shorts. Saari told Motzko she could not wear the new shorts and asked if she could wear the previous uniform. After that request was refused, Saari understood she was no longer employed by Jose's.

21. Elizabeth Sheehan came to work on May 4, 1989, to work her first shift after the orange running shorts were introduced. Sheehan had heard from friends at the restaurant about the shorts. When she was shown the shorts by Sandy Cordova, Sheehan stated that she would not wear that article of clothing for work. Sheehan offered to wear the prior uniform. That offer was refused and Sheehan was not allowed to work.

22. After the uniform change, Lori Lickteig tried on the new uniform at her home. She was distressed that the top was cut so low the her bra and breasts were visible. The shorts revealed her thighs, butt, and pubic hair. She decided that, since she would not wear the uniform, it was not proper to require others to wear the uniform. In talking with Mark Rutsick over the uniform policy, he told Lickteig that the idea was to show some "T and A" (top and ass). On May 5, 1989, Lickteig quit work at the Minneapolis Jose's.

23. John Sable began bartending at the Minneapolis Jose's in February, 1988. In April, 1989, Sable was promoted to the position of bar manager. At that position, Sable was responsible for inventory, training of bar staff, and bartender scheduling. In addition, Sable shared responsibility in hiring bartenders with Sandy Cordova. Before the uniform change, Sable was shown the tank top and shorts by Cordova. He expressed his opinion to Cordova, Motzko, and Boyne that the uniform was too revealing and that the female waitstaff should not be required to wear such clothing. No suggestion was made that

male bartenders would have a uniform change as well. Cordova told Sable that refusal to wear the uniform would mean the women were no longer working for restaurant. Motzko told Sable that women not wearing the uniform would be of luck." Boyne indicated that Sable needed to be a "team player."

24. Sable was away from work from April 28, 1989, to May 4, 1989, for final exams at the University of Minnesota. On Friday, May 5, 1989, Sable returned to tend bar at the Minneapolis Jose's on the evening shift. He noted that the entire waitstaff was different and the uniform change had been

implemented. There was no uniform change for the male bartenders. Linda Shaefer, wife of Joseph Shaefer, was working as a waitress. Linda Shaefer was not wearing the new uniform.

25. Restaurant operations did not go smoothly on May 5, 1989. Sable and another bartender, John Willis, had a conversation with Cordova, Motzko, Boyne and Rutsick. The conversation consisted of the management staff encouraging the bartenders to pick up the pace of service to customers and Sable asserted that the slow pace was due to an entirely new waitstaff and the new waitstaff was the result of the uniform change. Rutsick told Sable that Sable needed to support the uniform change. Sable stated that he did not support the uniform change and that he believed the change to be illegal. Rutsick told Sable, "Fuck your friends if they can't show a little ass." After the evening shift was over, Boyne fired Sable for not acting as a "team player."

26. At the time she was fired from employment with the Minneapolis Jose's, Mary Pucel was earning \$425 per week gross income. She expected to earn \$500 per week gross income over the summer. Pucel received unemployment compensation of \$360 per week for six weeks. On June 19, 1989, Pucel was hired by the Minneapolis Bar and Grill as waitstaff. As a trainee for the first two weeks, Pucel earned \$100 per week gross income. After those two weeks, Pucel's earnings at the Minneapolis Bar and Grill were comparable to those at the Minneapolis Jose's.

27. Kathleen Lucken Saari was earning \$425 per week net income at the Minneapolis Jose's when she was no longer allowed to work there. After being unemployed for two months, Saari found employment at Players as a bartender. She averaged \$7 per hour and initially worked 25 hours per week. After two months, Saari began work at Joe Senser's, a restaurant in Roseville. In that position, she averaged \$10 per hour and worked 25 hours per week. There was a short period when Saari worked at both Players and Joe Senser's. In June, 1990, Saari graduated from the University of Minnesota and in July, 1990, she moved to Wisconsin.

28. Kelly Lowrie earned \$300 per week net income at the Minneapolis Jose's. After her employment ended at the Minneapolis Jose's, Lowrie found employment in a seasonal position at Lord Fletcher's, a restaurant in Minnetonka. She earned approximately half the hourly net income she obtained at the Minneapolis Jose's. Her net income was \$250 per week. At the end of her seasonal job, Lowrie began work at Player's, a bar in Minneapolis. Since business was slow at Players, she left that position in Spring, 1990. At that time, Lowrie began employment at Kixx on the River, a bar in Minneapolis. Lowrie earned \$250 per week net income at that position. She stayed in that position for about a year.

29. Elizbeth Sheahan earned about \$300 per week at the Minneapolis Jose's. Immediately upon her employment there ending, Sheahan resumed work the lunch shift with Edwardo's, a Minneapolis restaurant that had formerly employed her. Sheahan earned \$60 per week at that position. After two months she left that position and began work at Players. Sheahan earned \$75 per week at that position. The work at Players lasted from July, 1989, to June, 1990. In October, 1990, Sheahan began a part-time position with the Minneapolis Star Tribune where she earned \$100 per week.

30. In April, 1989, John Sable earned between \$350 to \$400 per week at Minneapolis Jose's. The difference depended upon gratuities received. After he was fired from the Minneapolis Jose's, Sable received unemployment compensation totalling \$1,300. On September 12, 1989, Sable obtained a bartending job at Lyon's Pub in Minneapolis. Sable earned \$175 per week at that employment. In June, 1990, Sable graduated from the University of St. Thomas, quit his job with Lyon's Pub, and travelled to California.

31. Lori Lickteig earned \$400 per week net income at the Minneapolis Jose's. After she left employment with the Minneapolis Jose's, she was unemployed for two weeks. Lickteig then found a waitstaff position with Yvette's restaurant, earning a net income of \$200 per week. In mid-August, 1989, Lickteig began working for American Institute of Architects as an account salesperson and newsletter editor. Lickteig did not maintain any shifts from her work schedule at Yvette's when she began working for AIA.

32. On July 10, 1989, Kathleen Lucken Saari filed a charge with the Department alleging that Jose's American Grill committed a violation of the Human Rights Act for discrimination on the basis of gender. Elizabeth Sheal filed a similar charge on March 2, 1990. John Sable filed a charge with the Department on March 7, 1990, alleging that he was terminated from Jose's American Bar and Grill as a reprisal for opposing illegal discrimination. April 23, 1990, Kelly Lowrie filed a charge with the Department alleging discrimination in employment based on gender. On April 24, 1990, Mary Pucel filed a charge with the Department alleging she was terminated by Jose's American Grill in anticipation of her resistance to changing the uniform. April 27, 1990, Lori Lickteig filed a charge with the Department alleging discrimination on the basis of gender by Jose's American Grill.

33. The Department made a finding of probable cause on the charges filed by the Charging Parties. A Complaint was issued on November 30, 1993. Respondents issued an Answer on December 23, 1993.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Department of Human Rights and the Administrative Law Judge have jurisdiction of this matter pursuant to Minn. Stat. §§ 363.071, subd. 1, and 14.50.

2. The actions of RSJ, Inc., in requiring the female waitstaff to wear revealing uniforms, violate the prohibition against discrimination on the ba

of gender in Minn. Stat. § 363.03, subd. 1(2)(c). The imposition of the new uniform resulted in the constructive discharge of Kathleen Lucken Saari, Ke Lowrie, Elizabeth Sheahan, and Lori Lickteig.

3. The termination of Mary Pucel by RSJ, Inc. constitutes reprisal for opposition to discrimination in violation of Minn. Stat. § 363.03, subd. 7.

4. The termination of John Sable by RSJ, Inc. constitutes reprisal for opposition to discrimination in violation of Minn. Stat. § 363.03, subd. 7.

5. Joseph Shaefer is the responsible corporate officer of RSJ, Inc., and is personally liable for any award against RSJ, Inc. in this matter.

6. Joseph Shaefer aided and abetted RSJ, Inc. in discriminating against the female waitstaff it employed. Joseph Shaefer aided and abetted RSJ, Inc. in conducting reprisals against Mary Pucel and John Sable. Joseph Shaefer is personally liable for any award against RSJ, Inc. due to these violations of Minn. Stat. § 363.03, subd. 6.

7. As a result of Respondents' discriminatory acts, Mary Pucel suffered lost wages in the amount of \$3,315 and mental anguish.

8. As a result of Respondents' discriminatory acts, Kathleen Lucken Sable suffered lost wages in the amount of \$6,975 and mental anguish.

9. As a result of Respondents' discriminatory acts, Kelly Lowrie suffered lost wages in the amount of \$3,900 and mental anguish.

10. As a result of Respondents' discriminatory acts, Elizbeth Sheahan suffered lost wages in the amount of \$13,620 and mental anguish.

11. As a result of Respondents' discriminatory acts, Lori Lickteig suffered lost wages in the amount of \$3,000 and mental anguish.

12. As a result of Respondents' discriminatory acts, John Sable suffered lost wages in the amount of \$11,900 and mental anguish.

13. Imposition of a civil penalty against Respondents is appropriate.

14. Complainant is entitled to attorney's fees and costs under Minn. Stat. § 363.071, subd. 7.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

1. Respondents shall cease and desist their discriminatory conduct.

2. Respondents shall pay to Mary Pucel: \$3,315 for damages from lost wages; \$4,000 for damages from mental anguish; and \$4,000 for punitive damages. The total award to Mary Pucel is \$11,315.

3. Respondents shall pay to Kathleen Lucken Saari: \$6,975 for damages from lost wages; \$3,000 for damages from mental anguish; and \$3,000 for punitive damages. The total award to Kathleen Lucken Saari is \$12,975.

4. Respondents shall pay to Kelly Lowrie: \$3,900 for damages from lost wages; \$3,000 for damages from mental anguish; and \$3,000 for punitive damages. The total award to Kelly Lowrie is \$9,900.

5. Respondents shall pay to Elizabeth Sheahan: \$13,620 for damages from lost wages; \$1,000 for damages from mental anguish; and \$3,000 for punitive damages. The total award to Elizabeth Sheahan is \$17,620.

6. Respondents shall pay to Lori Lickteig: \$3,000 for damages from lost wages; \$2,000 for damages from mental anguish; and \$3,000 for punitive damages. The total award to Lori Lickteig is \$8,000.

7. Respondents shall pay to John Sable: \$11,900 for damages from lost wages; \$1,000 for damages from mental anguish; and \$3,000 for punitive damages. The total award to John Sable is \$15,900.

8. Respondents shall pay a civil penalty to the State of Minnesota in amount of \$3,000.

9. Complainant shall submit a petition for attorney's fees by November 11, 1994. Respondent may submit a response to the petition no later than November 28, 1994.

Dated: October 24, 1994.

/s/

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Kerri L. Brodock
Kirby A. Kennedy & Associates
Three Volumes

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

MEMORANDUM

Respondents argue that Complainant has failed to establish a prima facie case of discrimination under the McDonnell Douglas analysis. See Hubbard v. United Press International, Inc., 330 N.W.2d 428, 442 (Minn. 1983) (incorporating the analysis of McDonnell Douglas Corporation v. Green, 411 U.S. 406, 411 (1967)).

792 (1973)). Complainant asserts that the McDonnell Douglas analysis is inapplicable to this case.

That a uniform was required for the Respondents' female waitstaff is not in dispute. To the extent that requiring women to wear that uniform violates the Human Rights Act, there is direct evidence in this matter of discrimination. Where direct evidence of discrimination exists, the McDonnell Douglas analysis is not used. State by Cooper v. Hennepin County, 441 N.W.2d 106, 110 (Minn. 1989).

The women who were required to wear the new uniform at the Minneapolis Jose's described how revealing they are. E.E.O.C. v. Sage Realty Corporation, 507 F.Supp. 599 (S.D.N.Y. 1981), expressly holds that an employer does not have "unfettered discretion" to require any uniform and that uniforms that are revealing or sexually provocative can constitute sex discrimination under Title VII. Uniforms for female waitstaff that are short on the bottom and low cut on the top can constitute sex discrimination. Slayton v. Michigan Host, Inc., 198 N.W.2d 664 (Mich.App. 1985); Priest v. Rotary, 634 F.Supp. 571 (N.D.Cal. 1986).

The revealing nature of the uniform in this matter alone does constitute proof of gender discrimination. The wearing of the uniform must subject the employee "to unwelcome verbal or physical conduct of a sexual nature." EEOC Decision, No. 85-9, 37 F.E.P. Cases 1893, 1895 (May 7, 1985). In that case the female employees worked in a retail outlet and were required to wear bathing suits, a cover-up, sandals, beach hats, and sunglasses. The uniform requirement was a short term affair, lasting one week. The experience the women had at the store with customers was respectful. While some harassing conduct was experienced from persons outside the store, that conduct was not overtly sexual behavior toward those women.

The charging parties who wore the new uniform at the Minneapolis Jose's experienced overtly sexual, unwelcome verbal conduct by customers. Saari has jokes about the way her body was exposed by the uniform top. The new uniform was not required in a retail outlet mostly frequented by women, but a bar frequented by large numbers of drinking men. The atmosphere sought by Respondents at the Minneapolis Jose's encouraged a sexual connotation and enhanced the likelihood that unwelcome sexual behavior would be directed toward the female waitstaff.

This case falls squarely under the holdings of Sage and Michigan Host. The required uniform is too revealing of the bodies of the female waitstaff to fall within the unfettered discretion of the employer. The uniform clearly subjected the female waitstaff to unwelcome sexual conduct of a verbal nature. Requiring the female waitstaff to wear the uniform as a condition of employment violates the prohibition against sex discrimination by subjecting these women to a hostile environment. Minn. Stat. § 363.01, subd. 41(3). Their refusal to endure the hostile environment is reasonable. Denying the female waitstaff the opportunity to work without that environment is constructive discharge. See Continental Can Co. v. State, 297 N.W.2d 241, 251 (Minn. 1980).

Respondents argue that the new uniforms do not constitute discrimination on the basis of gender, since male bartenders were required to change uniforms from oxford shirts and long pants to T-shirts and biking shorts. The evidence in the record suggests that the change was an afterthought, not part of a

comprehensive uniform change for all staff. Further, the orange running shorts are not the same as biking shorts. The orange running shorts, required of female waitstaff and bartenders, are high-cut and expose most of the women's thighs and buttocks. Biking shorts, while tight, extend down to within several inches of the knee. The change to biking shorts does not preclude the conclusion that Respondents' actions constitute a violation of the Human Rights Act. Even if men had been required to wear revealing uniforms, that would not lessen the hostile atmosphere the women experienced on account of their gender.

Respondents maintain that Mary Pucel's discharge was the result of prior misconduct and unrelated to the uniform change. The alleged misconduct happened a year prior to Pucel's discharge. Pucel was named employee of the month in the same month as her discharge. A manager discussed the possibility of a promotion in the same month as her discharge. Pucel's excellent work performance and prior opposition to requiring female waitstaff to wear revealing uniforms supports the inference that she was discharged as part of the plan to change the uniform requirement. Such a discharge constitutes a reprisal in violation of the Human Rights Act. Minn. Stat. § 363.03, subd.

Respondents argue that John Sable was discharged for poor work performance on his last night of work. Respondents also allege an incident of theft involving Sable. The theft allegation is not credible. There is some evidentiary support for the poor work performance theory advanced by Respondents. Sable was unhappy with the new uniform policy and that unhappiness was not concealed at work. The preponderance of the evidence, however, shows that Sable's work performance was consistent throughout his employment, including his last day. His discharge was the direct result of opposition to the new uniform policy. That discharge is a reprisal in violation of the Human Rights Act. Minn. Stat. § 363.03, subd. 7.

The evidence concerning damages is criticized by Respondent as being inadequate to support an award of damages. Respondents point out that income tax returns were not used to support the charging parties' testimony. There is conflicting testimony about Sable's hour pay rate. The Complainant asserts that the evidence on wages is sufficient to support an award. Respondents' position is:

Where a precise and exact method of measuring backpay is readily available, the Complainant should be required to produce this evidence as a prerequisite to meeting its burden. Because the Complainant has completely failed to produce this evidence, an award of back pay should be denied.

Respondents Memorandum of Law, at 22.

Respondents had discovery available to them to obtain documentary evidence of the earnings of the charging parties. Tax returns could have been included in a request for production of documents. Further, the business records of Minneapolis Jose's are in the possession of Respondents. Documentary evidence to demonstrate the final hourly wage of the charging parties should be available from that source. As to mitigation of the damages incurred, the testimony of the charging parties is consistent and credible. Several of the female waitstaff went to work at the same location after being terminated by

the Minneapolis Jose's. Their descriptions of the income derived from that employment is consistent. Their descriptions of the shifts available to them as producing less tip income are credible. Complainant is under no obligation to seek out additional evidence of damages. Any risk of inadequate proof of damages is on the Complainant.

The testimony of Sable is characterized by Respondents as "preposterous. The testimony so criticized is the comparison of Sable's recollection to his

tax returns. The testimony concerning his hourly wage is consistent with the wage testimony of Lori Lickteig, who held a similar position with the Minneapolis Jose's.

Respondents also criticize the testimony of Kathleen Lucken Saari that she earned \$20 per week after being terminated. Respondents Memorandum, at 24. Saari's testimony is that she "was bringing home around \$20 a night" Transcript, Volume I, at 127 (emphasis added). This is consistent with the minimum wage paid to waitstaff and the limited tip income available when a minimum position is taken. Respondents' criticism is groundless.

The Judge has carefully examined the record to compare dates with events in the history of this matter. The testimony regarding wages and gratuities has been examined critically to arrive at the net income received by the Charging Parties. The net income of each charging party earned at the Minneapolis Jose's has been reduced by the amounts earned in mitigation at employments obtained after the termination of the employees. Unemployment compensation received by the charging parties has not been subtracted from the damage amounts as this would detract from the nature of that compensation and provide an unwarranted benefit to Respondents.¹ Upon any of the Charging Parties experiencing a change in life that would have ended their employment at the Minneapolis Jose's, the damage calculation is concluded. Where voluntary unemployment occurs, the damage calculation is concluded.

¹/ In other cases, unemployment compensation benefits have been deducted from backpay awards under the Human Rights Act. See Continental Can, 297 N.W.2d at 251 (reduction of backpay award not arbitrary or capricious). Where a governmental entity is the payor, backpay must be reduced by unemployment compensation received. Young v. City of Duluth, 415 N.W.2d 20 (Minn. 1987). This principle was adopted by the Minnesota Supreme Court in Robertson v. Special School District No. 1, 347 N.W.2d 265, 267 (Minn. 1984). In Robertson, the Supreme Court stated:

We do not address the question of whether a private employer is entitled to offset unemployment compensation benefits received by an employee against backpay to which the employee is entitled.

Id. at 267.

Part of the reasoning in Robertson was that the veterans preference statute entitled the veteran to restoration of employment and backpay, but nothing else. Id. In the Human Rights Act, the full panoply of remedies, including trebling damages, punitive damages, and attorney's fees are available. Given the punitive approach of the Human Rights Act, the presumption against an employee receiving a "double recovery" is inapplicable.

Under Minn. Stat. § 363.071, subd. 2, punitive damages may be awarded in a discrimination matter pursuant to Minn. Stat. § 549.20. The statute on punitive damages requires clear and convincing evidence that the "acts of the defendants show deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20, subd. 1. The measure of damages requires assessment of the seriousness, profitability, and duration of the harm. Minn. Stat. § 549.20, subd. 3. In addition, the number of employees affected, awareness of the wrongdoer, attitude of the wrongdoer, and financial condition of the wrongdoer must be taken into account. Id. Lastly, the total effect of other punishment on the wrongdoer must be considered. Id.

Respondents deliberately disregarded the rights of the employees to work in an atmosphere free of unwanted sexual conduct. The action was taken to improve business at the Minneapolis Jose's. The harm extended beyond the few days when the uniform policy affected the charging parties, due to the continuing financial impact and the lingering embarrassment of having been associated with the restaurant. While the number of charging parties is small, the number of employees who quit at the Minneapolis Jose's is substantial. Respondents have been unapologetic toward the Charging Parties. Substantial damages have been imposed for backpay and Joseph Shaefer is in bankruptcy.

Taking all the foregoing factors into account, the difference in punitive damage awards is based on the action of the employer toward each individual employee. Respondents' knowledge that the uniform change could be illegal and Respondents' unwillingness to accommodate reasonable requests to modify those uniforms has established the smallest punitive award. Terminating John Sabo for opposing the policy was an intentional act taken in disregard of the discriminatory environment created by the new uniforms and would tend to chill any further opposition. Thus, punitive damages for that act are somewhat higher. Respondents' firing of Mary Pucel demonstrated a premeditated plan to eliminate known opposition to revealing uniform requirements. Thus, that act has been assessed the highest punitive damage award.

None of the charging parties sought counseling for emotional problems. Respondent asserts that this fact and the self-interest of the Charging Parties results in no evidence of emotional harm upon which an award can be based. Respondent also asserts that emotional anguish could have been avoided by the charging parties wearing the new uniform. This latter argument demonstrates the Respondents' continued failure to understand why an employer does not have "unfettered discretion" to require uniforms that are revealing and will result in unwelcome sexual conduct. The new uniforms are the primary source of the Charging Parties' mental anguish. The Respondents' actions in terminating the charging parties added to that mental anguish. To argue that persons suffer

from sexual harassment should go along with that harassment to reduce their damages is nonsensical.

The absence of counseling does not vitiate the Charging Parties' claim of mental anguish. The Charging Parties met at the time of the uniform change outside the workplace to plan a collective response. This effort provided a benefit similar to counseling. Most of the charging parties were about twenty years old, in college, and not otherwise employed. To expect persons worried about meeting their rent payments to spend money they do not have on counseling is unreasonable. The Charging Parties' testimony on their mental anguish is credible and requires the awards made in this matter.

Shaefer's belief in the propriety of the uniform change, an inquiry to Minnesota Department of Labor and Industry, and allowing the female waitstaff to alter the uniforms are cited as reasons to deny an award of punitive damages. Shaefer's subjective belief in the propriety of the uniform change is not believable. He was exploiting the women's bodies for financial gain. A number of his employees, including several of the Charging Parties, opined that such a change was illegal. There is no evidence as to the level of discussion with the unnamed Department of Labor and Industry employee that Shaefer telephoned that would support a finding that he reasonably relied upon that discussion. Pucel's discharge indicates a plan to effect a controversial uniform change. The female waitstaff were not allowed to wear other garments under the new uniform prior to their termination. Since the Minneapolis Jose's did not alter its uniform policy to allow other garments to be worn at any time relevant to the Charging Parties' termination, no such policy has been taken into account in setting the punitive damage award.

Respondents' argue that their financial situation and the lack of seriousness of any discrimination supports denial of any civil penalty. The civil penalty is calculated based on the seriousness and extent of the discrimination, the public harm caused, whether the violation was intentional, and the financial condition of the Respondents. Respondents' discrimination is serious, widely publicized, intentional, and extensively litigated. Shaefer is in bankruptcy, but still receiving substantial amounts derived from the sale of one of his restaurants. Considering the factors listed, a civil penalty of \$3,000 is appropriate.

Respondents have not resumed their arguments concerning the Judge's holding on the issue of liability in the Motion for Summary Disposition. They have challenged the use of precedents and the interpretation of the law made by the Judge in ruling on that Motion. Respondents argue that the holding in State by McClure v. Sports and Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), "offers no guidance on the issue of aiding and abetting under the Human Rights Act." Respondents Memorandum, at 31. The Judge reads Sports and Health as allowing an aiding and abetting claim against corporate officers, so long as the "corporate veil" is not pierced to create personal liability for those officers. Id. at 854. If the Supreme Court did not consider aiding and abetting claims against corporate officers to be valid, the analysis in Sports and Health quoted in the Order would be unnecessary. Under the aiding and abetting approach, Shaefer is personally liable for his intentional acts which aided RSJ, Inc. in discriminating against the Charging Parties. Shaefer is also personally liable for aiding RSJ, Inc. in reprisals against Pucel and Sable.

In the Order on the Motion for Summary Disposition in the matter, the responsible corporate officer doctrine was discussed as a possible alternative basis for finding Shaefer personally liable under the Human Rights Act. Respondents argue that the doctrine is inapplicable to the Human Rights Act because:

The doctrine applies only to public welfare offenses which oppose (sic) strict liability "by plain language and intent." Dougherty, 42 N.W.2d at 489 (sic) [In the Matter of Dougherty, 482 N.W.2d 485 (Minn.App. 1992), rev. denied June 10, 1992.]

Respondents Memorandum, at 32.

The Act prohibits employers from discriminating on the terms and conditions of employment on the basis of gender unless the terms and conditions are based on bona fide occupational qualifications. Minn. Stat. § 363.03, subd. 1(2)(c). The definition of "discriminate" includes sexual harassment. Minn. Stat. § 363.01, subd. 14. The definition of "sexual harassment" includes:

physical conduct ... of a sexual nature when:

. . . (3)
that conduct ... has the purpose or effect of substantially interfering with an individual's employment ... or creating an intimidating, hostile, or offensive employment ... environment; and in case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Minn. Stat. § 363.01, subd. 41.

The liability of an employer who "knows or should know of the existence of the harassment" is strict liability. No scienter, or intent to discriminate, is required for an employer to be held liable. Gillson v. Minnesota Department of Natural Resources, 492 N.W.2d 835, 841 (Minn. 1992), rev. denied January 1993. Aiding and abetting, on the other hand, expressly requires intent because a person can be held liable under the Human Rights Act. Minn. Stat. § 363.01, subd. 6. It is important to point out that there is no difference in the effect of using either the responsible corporate officer doctrine or the aiding and abetting approach. Under either theory, Shaefer is personally liable for his actions.

Minn. Stat. § 363.071, subd. 7, requires the administrative law judge to award all appropriate litigation and hearing costs to the State where a respondent is found to have engaged in an unfair discriminatory practice. If the Department seeks such an award, the Department should submit an itemized breakdown of its expenses. The Respondents have the right to respond to any such request and a hearing will be scheduled, should one be necessary.

Requiring the female waitstaff to wear revealing uniforms at the Minneapolis Jose's constitutes unlawful discrimination by the employer, RSJ, Inc. Shaefer is the responsible corporate officer who made the decision to require those uniforms. Shaefer intentionally aided and abetted RSJ, Inc. in that discrimination. Firing Pucel and Sable constitutes reprisal under the Human Rights Act. RSJ, Inc. is liable for that violation. Shaefer is the responsible corporate officer for those actions. Shaefer intentionally aided and abetted RSJ, Inc. in those reprisals.

S.M.M.

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